In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 923

CONSUMERS PRODUCTS OF AMERICA, INC., ET AL.

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 7–14) is reported at 400 F. 2d 930. Neither the initial decision of the hearing examiner (Pet. App. 41–57) nor the final order and opinion of the Federal Trade Commission (Pet. App. 17–40) is officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15–16) was entered on October 11, 1968. The petition for

[1] "Pet. App." refers to the appendix to the petition for certiorari.

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a writ of certiorari was filed on January 9, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Trade Commission's cease-and-desist order barring petitioners from the use of false or misleading statements in merchandising was reasonably related to redressing the deceptive practices found by the Commission.

STATUTE INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, as amended by 52 Stat. 111 and 66 Stat. 632 (15 U.S.C. 45 (a)(1)), provides:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

Petitioners seek review of a cease-and-desist order entered against them by the Federal Trade Commission and unanimously affirmed by the court of appeals. They do not challenge the Commission's finding that they engaged in deceptive practices, but contend only that paragraph one of the order is too broad. Paragraph one (Pet. App. 10) requires petitioners to cease and desist from

> Using, in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise or services.

The Commission made the following findings:

At all material times, petitioners were engaged in advertising and selling encyclopedias, dictionaries and other books (Pet. App. 43). The World-Wide Encyclopedia (World-Wide) and New Standard Encyclopedia (New Standard) were their principal sales items (Pet. App. 44). Petitioners ran newspaper, car card, magazine and television advertisements for World-Wide (selling at $9.95) but did not advertise New Standard (selling at $159.50) (Pet. App. 44). The typical advertisement for World-Wide claimed that it was a "college education in itself" and that it "is especially valuable where children of school age use these notable volumes as an aid in their studies" (Pet. App. 32). The advertisement stated that if it were answered within ten days, a free Webster's dictionary would be sent without charge or obligation and that the encyclopedia would be sent prepaid for a five-day free trial (Pet. App. 29–31, 49).

When prospective purchasers answered the advertisements, instead of a dictionary or encyclopedia, they received a visit from a salesman employed by petitioners (Pet. App. 46). The salesman made no serious attempt to sell World-Wide; he directed his entire presentation to the sale of New Standard (Pet. App. 32–35, 46). He displayed a worn and shabby copy of World-Wide and discouraged its purchase by statements that World-Wide was outdated, was for children in lower grades of school than those of the prospective purchaser or was not complete (Pet. App. 32–35). Then he extolled the virtues of New Standard (Pet. App. 32–35). The "free gift"

dictionary was given "free without charge" only to people who purchased an encyclopedia (Pet. App. 29). Salesmen made commissions only on sales of New Standard (Pet. App. 47–48). They received nothing for World-Wide (Pet. App. 47–48). The amount spent in advertising World-Wide each year averaged almost five times its yearly sales (Pet. App. 47). New Standard was not advertised at all (Pet. App. 47).

The Commission found that petitioner's method of selling encyclopedias was a "bait and switch" scheme, and that it was an unfair and deceptive practice under Section 5 of the Federal Trade Commission Act (Pet. App. 22–40). With a modification not here relevant, the court of appeals affirmed and enforced the Commission's order (Pet. App. 1–16).

ARGUMENT

Petitioners here urge only that paragraph one of the cease-and-desist order is too broad, vague and undefined. This Court has repeatedly stated, however, that the scope of an order of the Federal Trade Commission should not be disturbed on judicial review so long as the remedy is reasonably related to the unlawful practices found. *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 612–613; *Federal Trade Commission* v. *Henry Broch & Co.,* 368 U.S. 360; *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 392–395. The Commission's broad discretion to formulate effective relief is not limited to prohibiting the illegal practice in the precise form in which it had previously existed. *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473.

The court below correctly applied these standards in concluding that the Commission's order here was reasonably related to correcting petitioners' violations. As the court below noted, while the specific prohibitions contained in the order might be sufficient to prevent precise repetitions of petitioners' unlawful conduct, the more comprehensive provisions of paragraph one were necessary to prevent petitioners from changing the "formula" of their false, misleading and deceptive statements, and continuing to deceive the public as they had done before (Pet. App. 13).

Such relief was obviously appropriate on this record. The Commission found that petitioners had used bait-and-switch tactics in their sales of encyclopedias over an extended period of time and that they had made a multitude of false representations, including false free offers and misrepresentations as to the quality of their product (Pet. App. 31–35, 48–50). In these circumstances, it is not unreasonable or "asking too much of petitioners to require them to simply tell the truth in their advertisements and oral representations" (Pet. App. 13). As this Court has said, "those caught violating the Act must expect some fencing in." *Federal Trade Commission* v. *National Lead Co.,* 352 U.S. 419, 431.

There is no conflict between *American Home Products* v. *Federal Trade Commission,* 402 F. 2d 232 (C.A. 6), and the decision below. *American Home Products* involved solely misrepresentations as to the efficacy of one of a number of drug products the company sold. Here, in contrast, the violation was not merely misrepresentations as to the quality of a prod-

uct, but embraced the whole method of doing business itself, *i.e.*, by a bait-and-switch scheme. Paragraph one effectively and appropriately bars petitioners from continuing this deceptive practice in any form. See *Federal Trade Commission* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392–393; cf. *Doherty, Clifford, Steers & Shenfield, Inc.* v. *Federal Trade Commission*, 392 F. 2d 921 (C.A. 6).[2]

[2] Petitioners' claim that paragraph one subjects them to contempt proceedings in the absence of a prior administrative proceeding is without substance. As the Court stated in *Federal Trade Commission* v. *Colgate-Palmolive Co.*, *supra*, 380 U.S. at 394:

> * * * If, however, a situation arises in which respondents are sincerely unable to determine whether a proposed course of action would violate the present order, they can, by complying with the Commission's rules, oblige the Commission to give them definitive advice as to whether their proposed action, if pursued, would constitute compliance with the order.

And, as the court below reasoned (Pet. App. 13):

> If petitioners fail to avail themselves of this procedure, and the Commission suspects a violation of paragraph 1 of the order, petitioners will have ample opportunity to dispute the applicability of the order's prohibition within the context of a given factual situation. See Jaffe, The Judicial Enforcement of Administrative Orders, 76 Harv. L. Rev. 865 (1963).

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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